

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

CONSOLIDATED COMMUNICATIONS, INC.,	§	
	§	
	§	
Respondent,	§	
	§	
and	§	CASE 16-CA-196201
	§	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	§	
	§	
	§	
Charging Party.	§	

**CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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Table of Contents

Table of Contents	i
Table of Authorities	iii
I. Summary of Exceptions	1
Exception No. 1: Charging Party excepts from the ALJ’s erroneous framing of the issue as being the overall premium cost rather than the amount bargaining unit employees had to contribute for the cost of insurance following the first 2017 open enrollment.	1
Exception No. 2: Charging Party excepts from the ALJ’s determination that Respondent did not violate Section 8(a)(5) of the Act when Respondent did not follow the past practice of allocating premium costs between Respondent and bargaining unit employees.	2
Exception No. 3: Charging Party excepts from the ALJ’s decision reliance on <i>E.I. Du Pont de Nemours</i> , 364 NLRB No. 113 (2016), a decision that was overruled by the Board in <i>Raytheon Network Centric Sys.</i> , 365 NLRB No. 161 (2017).	2
Exception No. 4: Charging Party excepts from the ALJ’s determination that Respondent did not violate Section 8(a)(5) of the Act by unilaterally changing a mandatory subject of bargaining by requiring employees to pay an amount other than the amount required by the recently expired CBA’s formula for allocating the cost of the insurance premium between Respondent and employees.	3
II. Statement of the Facts	4
III. Arguments and Authorities	9
a. Exception No. 1: The ALJ erroneously framed the issue as concerning the overall premium cost rather than the amount bargaining unit employees had to contribute for the cost of insurance	9
b. Exception Nos. 2 & 3: Respondent violated Section 8(a)(5) of the Act when it did not follow the past practice for determining employees’ contribution for health insurance and this error resulted from the decision’s reliance on overruled authority.	10
c. Exception No. 4: Respondent violated Section 8(a)(5) of the Act by unilaterally changing the percent of the healthcare premium employees were responsible by requiring them to pay more than the percent required by the recently expired CBA’s allocation formula.	12

1.	The Total Premium Costs for 2017 were lower than 2016.....	14
2.	Respondent committed a unilateral change by not using the 2017 premiums as the basis for determining the employees' contribution.....	15
IV.	Conclusion	18
	CERTIFICATE OF SERVICE	19

Table of Authorities

Cases

<i>Air Convey Indus.</i> , 292 NLRB 25 (1988)	16
<i>E.I. Du Pont de Nemours</i> , 364 NLRB No. 113 (2016)	<i>passim</i>
<i>Earthgrains Co.</i> , 351 NLRB 733 (2007)	14
<i>House of the Good Samaritan</i> , 268 NLRB 236 (1983)	17
<i>Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.</i> , 484 U.S. 539 (1988)	16
<i>Litton Fin. Printing Div. v. NLRB</i> , 501 U.S. 190 (1991)	3, 15
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	15
<i>Pergament United Sales, Inc.</i> , 296 NLRB 333 (1989), <i>enfd</i> 920 F.2d 130 (2d Cir. 1990).	13
<i>Raytheon Network Centric Sys.</i> , 365 NLRB No. 161 (2017)	<i>passim</i>
<i>W.W. Cross & Co. v. NLRB</i> , 174 F.2d 875 (1st Cir. 1949)	3, 16

Statutes

29 U.S.C. § 158(a)(5)	<i>passim</i>
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Rules

NLRB Rules & Regulation §102.15(b), 29 CFR § 102.15(b)	13
NLRB Rules & Regulations §102.42, 29 CFR § 102.42	1

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COMES NOW Charging Party Communications Workers of America, AFL-CIO (“Charging Party” or “the Union”) and, pursuant to Section 102.46 of the Rules and Regulations (“R&R”) of the National Labor Relations Board (“NLRB” or “the Board”), 29 C.F.R. § 102.46, files these exceptions to the March 27, 2018 decision (“Decision”) by the Administrative Law Judge (“ALJ”) in Case 16-CA-196201 holding that Respondent Consolidated Communications, Inc. (“Respondent” or “Consolidated”) did not violate Section 8(a)(5) of the National Labor Relations Act (“the Act” or “NLRA”) , and would respectfully show the Board the following:

I. Summary of Exceptions

Exception No. 1: Charging Party excepts from the ALJ’s erroneous framing of the issue as being the overall premium cost rather than the amount bargaining unit employees had to contribute for the cost of insurance following the first 2017 open enrollment.

Charging Party excepts from the ALJ’s decision in this case because the ALJ erroneously focused in his decision on the method by which the total premium was determined rather than the discrete issue of the amount of the premiums employees should be required to pay based on the

percent allocations stipulated by the collective bargaining agreement (“CBA” or “labor agreement”). (Decision at 5-6). This error by the ALJ resulted in his undue focus on the method by which the total healthcare premium was calculated rather than the specific issue of calculating the employee contribution of that premium based on a percentage of the premium as stated in the CBA.

Exception No. 2: Charging Party excepts from the ALJ’s determination that Respondent did not violate Section 8(a)(5) of the Act when Respondent did not follow the past practice of allocating premium costs between Respondent and bargaining unit employees.

Charging Party excepts from the ALJ’s determination that Respondent did not violate the past practice between the parties, and therefore did not violate Section 8(a)(5) in the manner in which the 2017 employee portion of the health insurance premiums were calculated. (Decision at 6). This decision is erroneous because the record as reflected in Respondent Exhibit 3 establishes that the practice computing the premium and multiplying that figure by the percentage of the employee contribution required by the CBA. The employee contribution to the healthcare premiums should therefore have been adjusted downward by Respondent and “lawfully implemented consistent with its ‘long-standing practice.’” *Raytheon Network Centric Sys.*, 365 NLRB No. 161, slip op. at 18 (2017).

Exception No. 3: Charging Party excepts from the ALJ’s decision reliance on *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016), a decision that was overruled by the Board in *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017).

Charging Party excepts from the ALJ’s March 27, 2018 decision because of its reliance on *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) to support proposition that “Consolidated’s decision to maintain the status quo ante regarding a discretionary matter such as health insurance premiums, while contract negotiations were pending, was nevertheless lawful under extant Board

law.” (Decision at 6, citing *Du Pont*, 364 NLRB No. 113, slip op. at 10.). *Du Pont* was overruled by the Board on December 15, 2017 because *Du Pont*, in relevant part, led to “the inability of employers to act in line with past practice.” *Raytheon*, 365 NLRB No. 161, slip op. at 16). The ALJ’s reliance on *Du Pont* resulted in his decision failing to give proper weight to the past practice of the parties and to dismiss the application of that past practice in regards to the calculation of employees’ contribution to their health insurance premiums.

Exception No. 4: Charging Party excepts from the ALJ’s determination that Respondent did not violate Section 8(a)(5) of the Act by unilaterally changing a mandatory subject of bargaining by requiring employers to pay an amount other than the amount required by the recently expired CBA’s formula for allocating the cost of the insurance premium between Respondent and employees

Charging Party excepts from the ALJ’s determination Respondent did not violate Section 8(a)(5) of the Act by unilaterally changing employee contributions to health insurance premiums as a result of requiring employees after the first open enrollment for health insurance in 2017 to pay a premium amount higher than that which they should have paid based on the established working conditions under the expired CBA’s premium allocation formula. (Decision at 6).

The terms of a CBA survive its expiration. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Health insurance premiums are a mandatory subject of bargaining. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). Based on Respondent Exhibit 3, the premiums for 2017 were lower than they were in 2016. These lower premiums should have been multiplied by the percentage in the CBA’s premium allocation formula and yielded a lower dollar amount to be paid by employees not because the percentage had changed, but because the premium itself was lower. Respondent’s failure to do so results in a violation of Section 8(a)(5).

II. Statement of the Facts

Respondent and Charging Party are parties to a longstanding collective bargaining relationship. In 2016, the parties entered into negotiations for a successor agreement and were unable to reach an agreement before the 2013-2016 agreement (Joint Exhibit (“J”) 2) expired. The labor agreement provided employees with a choice of three insurance plans, the Plus Plan, Standard Plan, and the CDHP or high deductible plan. That agreement required employees pay a specified percent of the total health insurance premium as follows:

Plus Plan

2014	30% of total premium
2015	35% of total premium
2016	40% of total premium

Standard Plan

2014	20% of total premium
2015	20% of total premium
2016	20% of total premium

CDHP Plan

2014	5% of total premium
2015	5% of total premium
2016	5% of total premium

(J 2, p. 53). The total premium is the total amount that the employer pays for the employee at that point in time. (Transcript (“Tr.”) 27). When the agreement expired on October 16, 2016 (J 2, p. 67), the collective bargaining agreement (“CBA”) required the employer to charge employees 40% of the premium for the Plus Plan, 20% of the premium for Standard Plan, and 5% of the total premium high deductible plan.

Prior labor agreement have always required employees pay a percentage of the premium and the parties have never bargained over the cost of the premium. Darrell Novark, a former CWA local president and bargaining committee member, testified that the practice of employees contributing to the cost of the health insurance premium by paying a percent of the premium had been in place approximately ten years. (Tr. 29-30). The 2004 CBA did not require active employees to contribute any dollar amount to the cost of the premium. (J 5, p. 53). The 2007 CBA was the first to require active employees to pay a percent of the premium as follows:

2008	5% of total premium
2009	10% of total premium
2010	15% of total premium

(JX 4, p. 52). The 2010 CBA required employees to pay the following percent of the premium:

Plus Plan

2011	17.5% of total premium
2012	20% of total premium
2013	22.5% of total premium

Standard Plan

2011	15% of total premium
2012	15% of total premium
2013	20% of total premium

CDHP Plan

2011	5% of total premium
2012	5% of total premium
2013	5% of total premium

(JX 3, p. 53). This evidence establishes that the parties did not bargain a dollar amount for the employee contribution to the healthcare premium. Rather, throughout the time employees have

contributed to the monthly cost of the premium, the parties always agreed on a percent of the total premium that the employees would pay.

In late October or early November of 2016, after the expiration of the 2013 CBA but while the parties were still negotiating for a successor agreement, Rhett Bobo, Respondent's former Director of Labor Relations, informed Novark and other members of the bargaining committee that the premiums would be going down. (Tr. 30-31). This decrease was not conditional on any other proposal. (Tr. 34). Respondent held an open enrollment in December 2016 for the year 2017, but Novark did not notice a decrease in the amount he contributed to his healthcare costs; the dollar amount he paid remained the same. (Tr. 32).

The employer sought in the 2016-17 negotiations to eliminate the Plus Plan from the insurance options available to employees. During the bargaining, Respondent provided Charging Party with information showing that the Plus Plan total monthly premium in 2016 for an employee only was \$695.99, for an employee with spouse was \$1,440.69, for an employee with children was \$1,350.21, and for an employee with family was \$2,122.76. (General Counsel Exhibit ("GC") 5). The Standard Plan total monthly premium in 2016 for an employee only was \$659.92, for an employee with spouse was \$1,366.04, for an employee with children was \$1,280.25, and for an employee with family was \$2,012.76. (Id.). The high deductible plan total monthly premium in 2016 for an employee only was \$575.77, for an employee with spouse was \$1,191.84, for an employee with children was \$1,116.99, and for an employee with family was \$1,756.10. (Id.). This information is consistent with the materials provided to bargaining unit employees during the enrollment for January 2017. (GC 8, p. 000702) and shows that as of December 2016 for the year

2017 enrollment, Respondent was using the premium costs from 2016 and not just the percent contribution stated in the CBA.

Respondent provided Charging Party with information during the bargaining that the 2017 premiums would be lower. The Standard Plan total monthly premium for 2017 for an employee only was \$553.40, for an employee with spouse was \$1,145.54, for an employee with children was \$1,073.60, and for an employee with family was \$1,687.88. (GC 6). For the high deductible plan, the total monthly premium for 2017 for an employee only was \$499.32, for an employee with spouse was \$1,033.59, for an employee with children was \$968.67, and for an employee with family was \$1,522.92. (Id.). These amounts are identical to the information provided to bargaining unit employees in the summer of 2017 when they went through a second open enrollment for 2017 after a successor agreement had been reached. (Charging Party (“CP”) 1, p. 3 (Bates 003188)).

Brooke Oliphant, an Account Executive with Arthur J. Gallagher & Co., Respondent’s insurance broker, was retained by Respondent to calculate insurance costs for 2017. Two of the tables she created showed premium totals identical to those provided to the Union in General Counsel Exhibit 6 and to bargaining unit employees in Charging Party Exhibit 1. (Respondent (“R”) 3, pp. 8-9). This document provides indisputable evidence that premiums were lower for 2017 and the corresponding employee contribution would be lower as well.

Respondent knew the premiums and their corresponding employee contributions would be lower as of September 26, 2016, the date of Respondent 3, because that exhibit contains the exact same premiums and allocations between Respondent and the employees as was used for the second open enrollment that occurred in July 2017 after the contract ratified. Respondent 3 contains a \$1,500.00 deductible Standard Plan with a 22.5% employee contribution and total premiums

ranging from \$553.40, \$1,145.54, \$1,073.60 and \$1,687.88; the HDHP has a 6% employee contribution and total premiums ranging from \$499.32, \$ 1,033.59, \$968.67, and \$1,522.92. (R 3, p. 9). These premiums are identical to those used in the July 2017 open enrollment. (CP 1, p. 003188). The July calculations have \$1,500.00 deductible and 22.5 employee contribution for the Standard Plan and 6% contribution for high deductible plan. (Id., pp. 003188-90). Thus, the calculations used for the enrollment after ratification were available during bargaining. The fact these figures are a constant from September 2016 to July 2017 shows that the premium costs and their decline was a known factor.

Respondent 3 also provided Respondent with data indicating that the rates for the three plans, including the plus plan, would decline in 2017. If contributions from employees remained at 40% for the Plus Plan, 20% for the Standard Plan, and 5% for the high deductible plan, employees would save in 2017 \$26.51, \$51.88, \$55.36, and \$81.58 per month depending on their type of coverage under the Plus Plan. (R 3, p. 5). They would save \$12.65, \$24.54, \$26.19, and \$38.58 per month depending on their type of coverage under the Standard Plan. (Id.). Under the high deductible plan, employees would save \$2.74, \$5.32, \$5.67, and \$8.36 per month depending on their type of coverage. (Id.). Respondent did not use these premiums when calculating employee contributions for the January 2017 open enrollment. Instead, as demonstrated by exhibits GC 5 and 8, it used the 2016 premiums to calculate the employee contributions and thereby charged employees more than they would otherwise pay.

III. Arguments and Authorities

a. *Exception No. 1: The ALJ erroneously framed the issue as concerning the overall premium cost rather than the amount bargaining unit employees had to contribute for the cost of insurance.*

Charging Party excepts from the ALJ's decision in this case because it erroneously focused in his decision on the method by which the total premium was determined rather than the discrete issue of the amount of the premiums employees should be required to pay based on the percent allocations stipulated by the CBA. (Decision at 5-6). The ALJ's framing of the issue as concerning the total premium costs rather than the employee contribution fails to apprehend the issue in this case. Respondent Exhibit 3 established the total premium costs should the Plus Plan be maintained, as it was following the enrollment for the period beginning in January 2017. (R 3, p. 5). Based on these premiums, Respondent determined employees would save between \$2.74 and \$81.58 per month depending on the plan they were on. (Id.).

The employee percentages applicable as of January 2017 were based on the last negotiated rates from the CBA. Those percentage were 40% for the Plus Plan, 20% for the Standard Plan, and 5% for the High Deductible/HDHP. (J 2, p. 53). These percentages correspond to the Employer contribution identified in Respondent 3 of 60% for the Plus Plan, 80% for the Standard Plan, and 95% for the HDHP. (R 3, p. 5). These facts follow the thesis of this case; Respondent, for whatever reason, was going to have lower premiums for its health plans in 2017, even if it continued to offer the Plus Plan. Based on the percentages stipulated by the 2016 contract, the lower premiums should have resulted in lower employee contributions. That the employees did not receive such savings is the basis for the unilateral change charge at issue in this case.

This theory does not require an analysis of how the total premium was arrived at. The only relevance of the total premium cost is that it is the amount used to determine the employees' percent contribution based on the negotiated rate. The premiums and their savings to employees are stated in the Respondent's exhibit. (R 3, p. 5). The ALJ's error in attributing undue weight the various factors that go into the premium cost obscured the fact that as of September 2016 Respondent knew the premium, and the corresponding employee contribution, would decrease. This decrease is confirmed by the fact that health plan implemented following ratification corresponded to a set of calculations before Respondent in September 2016. The ALJ's error in this regard resulted in his undue focus on the method by which the total healthcare premium was calculated rather than the fact that Respondent failed to follow the established past practice and as a result employees paid more for health insurance. As argued below, the failure to adjust the employee contribution to the cost of healthcare, and not the total premium, is the basis for the Section 8(a)(5) violation at issue in this case.

b. Exception Nos. 2 & 3: Respondent violated Section 8(a)(5) of the Act when it did not follow the past practice for determining employees' contribution for health insurance and this error resulted from the decision's reliance on overruled authority.

Charging Party excepts from the ALJ's determination that Respondent did not violate the past practice between the parties, and therefore did not violate Section 8(a)(5) in the manner in which the 2017 employee portion of the health insurance premiums were calculated. (Decision at 6). The ALJ's failure to find a violation of Section 8(a)(5) is part and parcel to the decision's reliance on *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016), a decision concerning an employer's latitude to make unilateral changes that was overruled by the Board in *Raytheon*, 365 NLRB No. 161, slip op. at 18.

Respondent's failure to follow the parties' practice of recalculating the employees' contribution based on the premium and the stipulated percent of that premium to be paid by the employees is established by the record in this case. The premium rates for 2017, including a calculation if the Plus Plan continued, were determined in September 2016. (R 3, p. 5). These premiums when multiplied by the percentage employees were responsible for would have resulted in employee savings ranging from \$2.74 to \$81.58 per month depending on the type of plan and coverage selected by the employees. (Id.). This past practice was not followed by Respondent in January 2017. Instead, it continued charging employees the same contribution amounts as they had been charged in 2016. (GC 5; GC 8, p. 000702). The use of the 2016 premiums to determine the employee contributions contravened the past practice and Section 8(a)(5) of the Act because the employee contribution to the healthcare premiums should have been adjusted downward by Respondent and the resulting lower premiums "lawfully implemented consistent with its 'long-standing practice.'" *Raytheon*, 365 NLRB No. 161, slip op. at 18.

The ALJ's decision, however, does not rely on the view of past practice articulated by *Raytheon*. Instead, it looks to the restrictive view of changes as a result of a past practice that lays at the heart of *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016). The decision relied on *Du Pont* to support proposition that "Consolidated's decision to maintain the status quo ante regarding a discretionary matter such as health insurance premiums, while contract negotiations were pending, was nevertheless lawful under extant Board law." (Decision at 6, citing *Du Pont*, 364 NLRB No. 113, slip op. at 10.). *Du Pont* was overruled by the Board on December 15, 2017 because *Du Pont*, in relevant part, led to "the inability of employers to act in line with past practice." *Raytheon*, 365 NLRB No. 161, slip op. at 16.

The ALJ's reliance on *Du Pont* in this case underscores the problem with *Du Pont* identified by the Board in *Raytheon*. *Du Pont* undermines the stability provided by an established past practice. While *Raytheon* focused on employer reliance on past practice for stability in bargaining relationships, it cannot be gainsaid that labor organizations and employees rely on past practice any less. *Raytheon* recognized a past practice as a term and condition of employment that permits employer action which does "not materially vary in kind or degree from what has been customary in the past." *Raytheon*, 365 NLRB slip op. at 16. In this case, the expectation of Charging Party and employees was that the employee contribution for the health insurance premiums would continue to be the percent specified in the CBA of the current insurance premiums.

The evidence in this case, as discussed above, establishes that the insurance premiums for Respondent were declining as reflected in Respondent Exhibit 3, even if Respondent maintained the Plus Plan, as Respondent maintained following the first 2017 open enrollment (R 3, p. 5). Respondent should have used these figures to calculate the employee contribution following the January 2017 open enrollment, not continued to charge employees the prior employee contribution dollar amounts. In failing to base its employee contribution rates on those premiums, Respondent contravened the teaching of *Raytheon* and violated Section 8(a)(5) of the Act.

c. Exception No. 4: Respondent violated Section 8(a)(5) of the Act by unilaterally changing the percent of the healthcare premium employees were responsible by requiring them to pay more than the percent required by the recently expired CBA's allocation formula.

Charging Party excepts from the ALJ's determination Respondent did not violate Section 8(a)(5) of the Act by unilaterally changing employee contributions to health insurance premiums by requiring employers to pay a premium amount other than the dollar amount required by the

recently expired CBA's formula to allocate premium costs between Respondent and bargaining unit employees. (Decision at 6).

This theory of the case is consistent with the language of the charge, which states Respondent "violated its obligation to bargain in good faith by unilaterally without notice to the Union changing terms and conditions of employment with respect to employer-employee cost sharing for health insurance." (GC 1(a)). This theory is also consistent with the allegation of the complaint that "Respondent, unilaterally, and contrary to its past practice, failed to adjust healthcare premiums for employees in the Unit." (GC 1(c), p. 3, ¶ 7(b)). This theory of the case was also advanced by Counsel for Charging Party during his opening statement and in response to questions from the ALJ thereafter. (Tr. 17-19). It was also advanced by Charging Party's closing brief and endorsed as an alternate framing of the case in Counsel for the General Counsel's closing brief. (Charging Party's Closing Brief, pp. 6-10; Counsel for the General Counsel's Closing Brief, p. 12).

Under Rule 102.15 of the Rules and Regulations of the NLRB, a complaint a complaint will contain "A clear and concise description of the acts which are claimed to constitute unfair labor practices." 29 CFR § 102.15(b). The Board has recognized latitude to go beyond the language of the complaint so as to "find and remedy a violation even in absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd* 920 F.2d 130 (2d Cir. 1990). An issue is fully litigated if the responding party would not have altered the presentation of its case so as to address the issue. *Pergament*, 296 NLRB at 335.

The alternate theory of the Section 8(a)(5) violation argued below does not require the introduction any evidence different than the past practice theory relied on by Counsel for the General Counsel. Both theories are 8(a)(5) unilateral change theories; the General Counsel's involved a change in past practice, the Charging Party's theory involves a change terms of the CBA in that the contract required Respondent to charge employees a percent of total premium to as the employee's contribution. Respondent's evidence concerning the bargaining history and past practice as to computing the employees' respective percentage of the premium would be , and is, the same evidence it would muster had Charging Party's Section 8(a)(5) theory been pleaded as an alternate theory of liability in the case. As the cornerstones for procedural due process are "notice and an opportunity to be heard," *Earthgrains Co.*, 351 NLRB 733, 735 (2007), sufficient notice was provided by the charge and arguments at the hearing, coupled with the overlap between the Charging Party's theory and the General Counsel's past practice theory, so as to warrant sustaining Charging Party's theory of the case. The issue was properly before the ALJ and the ALJ erred by failing to find a violation of Section 8(a)(5) on the basis of this theory as argued below.

1. The Total Premium Costs for 2017 were lower than 2016

The evidence recounted above establishes that premium costs for 2017 were lower than the costs for 2016 based on the calculations of Ms. Oliphant, including a scenario wherein Respondent offered the Plus Plan as it did for the period from January-June 2017. Ms. Oliphant's projection including the Plus Plan showed lower monthly premium costs for 2017 than in 2016. (R 3, pp. 5-6). Ms. Oliphant's premium calculations that included only the Standard Plan and high deductible plan also showed premium costs lower in 2017 than the corresponding 2016 costs. (Id, p. 6). The

information provided to Charging Party by Respondent also shows premiums decreasing from 2016 to 2017. (Compare GC 5 to GC 6). Despite the indisputable fact that premium costs decreased in 2017, Respondent continued charge employees the 2016 contribution rate following its open enrollment in December 2016 (GC 8, p. 4). Respondent did not begin charging employee contributions based on the 2017 premiums until following its second open enrollment in July 2017, after the successor contract ratified. (CP 1, p. 3).

Respondent's computation for the employee contribution for January through June of 2017, as argued below, constitutes an unlawful unilateral change because the employee percent contribution, not the dollar amount, carried forward from the 2013 CBA until the successor agreement was ratified. Respondent, however, continued to charge employees the same dollar amount and thereby violated Section 8(a)(5) because the CBA required employees be charged a percent of the premium, not a fixed dollar amount. The employee contribution percentages were 40% for the Plus Plan, 20% for the Standard Plan, a 5% for the high deductible plan. (J 2, p. 53). These percentages should have been applied to the premium costs contained in Respondent Exhibit 3. (R 3, p. 5). Respondent's failure to abide by the terms of the contract, which survived expiration in October 2016, violated Section 8(a)(5) of the Act.

2. Respondent committed a unilateral change by not using the 2017 premiums as the basis for determining the employees' contribution

Respondent's conduct in this case runs afoul of the prohibition against unlawful unilateral changes established by the United States Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962) and *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). Under *Katz*, "an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as

does a flat refusal.” *Katz*, 369 U.S. at 743. “The *Katz* doctrine has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Litton*, 501 U.S. at 198 (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)); see also *Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) (holding “It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.”).

Most mandatory subjects of bargaining fall within the *Katz* prohibition against unilateral changes. *Litton* at 199. Health insurance benefits and the amount of premiums for such benefits are a mandatory subject of bargaining. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). There is no exception for health insurance benefits and premiums from the rule of *Katz*. *Litton* at 199-200. Respondent was therefore obligated to follow the contract and require employees to pay the percentage of their premium as required by the 2013 CBA (JX 2, p. 53). Instead, Respondent used the 2016 premiums and the 2013 CBA’s percentage for the December 2016 enrollment. (GC 8, p. 4). No figure for the 2017 premiums, as discussed above, was equal to the 2016 premiums; all of those figure were lower. (R 3, pp. 5-6). As such, Respondent unilaterally changed the wages and/or terms of conditions of employment by not multiplying the established percentage by the new premium rates as reflected in Respondent Exhibit 3, Charging Party Exhibit 1, and General Counsel Exhibit 6.

This case presents the converse of *House of the Good Samaritan*, 268 NLRB 236 (1983). In *Samaritan*, an employer’s policy manual stated it would pay maximum amount for its premiums

and historically this amount exceeded the cost of the total premium. *Samaritan*, 268 NLRB at 236-37. After the employer was organized and bargaining begun, the cost of the premiums rose beyond the amount provided for in the manual and the employer passed the excess premium amount on to its bargaining unit employees but covered the costs as to its organized employees. *Samaritan* at 237. The Board held

What Respondent was required by law to do was to maintain the status quo. I find the status quo, with respect to health insurance premiums, to be reflected by the terms of Respondent's policy manual regarding health insurance as of May 7, 1981. There is insufficient evidence in this record to reflect that Respondent had always covered increases in premiums for its unrepresented employees and made this practice consistent and inflexible. Absent such proof, I believe Respondent was bound to adhere to the policy that was in effect as of May 7, 1981.

Accordingly, I find that Respondent has not violated the Act by passing along the cost of the increased health insurance coverage to technical bargaining unit employees while choosing to pay the increase in premiums for its unrepresented employees. *Id.*

As in this case, the parties in *Samaritan* did not agree to the premium, but an amount that the employer would cover. In *Samaritan*, that amount was reflected in a dollar figure, in this case it is reflected in a percentage allocation between the Respondent and bargaining unit employees. Respondent in this case, however, has done the opposite of the employer in *Samaritan*. Whereas the employer in *Samaritan* adhered to the terms in its manual and paid up to the amount it pledged, Respondent in this case did not multiply the new lower premiums by the percentages established in the CBA. No evidence in the record of this case shows that the 2017 premiums were equal to the 2016 premiums. Respondent's use of the old premiums therefore contravenes the rule established in *Samaritan* that an employer should adhere to its established policy. Respondent therefore violated Section 8(a)(5) of the Act when it used the old premium amounts from 2016 as

the basis of computing the employee contributions from January through June of 2017 and the ALJ erred in ruling the contrary.

IV. Conclusion

For all the foregoing reasons, Charging Party prays that the exceptions argued herein be granted, the decision of the Administrative Law Judge be vacated, and that the NLRB render a decision that Respondent Consolidated Communications, Inc. violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by failing to follow the parties past practice as to the calculation of bargaining unit employees' contribution to the health insurance premium and/or implementing a unilateral change as to the computation of the employee contribution to the health insurance premium that bargaining unit employees are required to pay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This section is to certify service of the above and foregoing instrument has been forwarded electronically to the parties below on April 24, 2018 as follows:

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